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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1964

No. 523

BARBARA ANN FARLEY, *Petitioner,*

vs.

ROSS E. FARLEY, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI
to the District Court of Appeal of the State of California,
in and for the Third Appellate District

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Petitioner prays that a writ of certiorari issue to review the judgment of the District Court of Appeal for the State of California in and for the Third Appellate District. Said judgment[1] was rendered by said court by opinion filed on April 29, 1964.[2] Agreeably

[1]The filing of the opinion, which concludes with a statement of the judgment, constitutes the rendition of the judgment on appeal. (See *Chin Ott Wong v. Title Ins. & T. Co.*, 91 Cal.App.2d 1, 204 Pac.2d 387.)

[2]The opinion is Appendix C hereto.

to Rules 27 and 28, California Rules of Court, petitioner requested rehearing by said District Court of Appeal. Said petition for rehearing was denied by the District Court of Appeal by order made and filed on May 25, 1964. Thereafter, agreeably to Rule 28, California Rules of Court, hearing by the California Supreme Court was requested. The petition for hearing was denied by order of the California Supreme Court made and entered on June 24, 1964. On June 29, 1964, pursuant to Rule 25, California Rules of Court, the judgment of the District Court of Appeal was certified and remitted to the Superior Court of the State of California in and for the County of Sacramento. The judgment, review of which is here sought, remands the cause to the trial court "for further proceedings consistent with this opinion." (Appendix C, *infra*, p. xiv.)

CITATION TO OPINION BELOW

The opinion of the District Court of Appeal, Appendix C hereto, is reported in 227 Adv.Cal.App. 1, 38 Cal. Rptr. 357.

JURISDICTION

On June 18, 1959, petitioner filed suit in the Superior Court of the State of California in and for the County of Sacramento seeking enforcement by that court of a divorce decree made and entered on October 3, 1958 by the District Court of the Third Judicial

District in and for Salt Lake County, State of Utah.[3] By the terms of the Utah decree respondent was ordered to execute and deliver documents required to convey to petitioner, as trustee, certain real property which he had acquired prior to his marriage to petitioner and which was located in the County of Sacramento, State of California. By the terms of the Utah decree, said trust was to be for the education and further support of the two minor children of the parties and was to terminate upon the younger of the two children attaining the age of 18 years at which time the corpus of the trust estate was to vest in said minor children.

On August 11, 1959, respondent filed suit in the Superior Court of the State of California, in and for the County of Sacramento, seeking to quiet his title to said real property.

These actions were consolidated for trial and, on May 28, 1962 judgments were entered by said Superior Court quieting respondent's title to said real property and denying enforcement of that portion of the Utah decree which ordered respondent to convey said real property to petitioner in trust for the children.[4]

Petitioner appealed from the judgments to the District Court of Appeal of the State of California, in and for the Third Appellate District, contending that

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[3]The Utah decree is Appendix A hereto.

[4]The judgments are Appendix B hereto.

they violated the mandate of the full faith and credit clause of the Constitution of the United States.

On April 29, 1964, the District Court of Appeal rendered its decision and judgment on said appeal which is set forth in Appendix C hereto. The final two paragraphs of said opinion were as follows:

> "We conclude that the Utah decree, so far as it directed conveyance of the land, its proceeds or income to defendant's children upon their reaching adulthood, exceeded the jurisdiction of the Utah court, that it is vulnerable to collateral attack in Utah and not entitled to full faith and credit in California. Plaintiff urges, nevertheless, that she is entitled to a similar disposition at the hands of the California courts as a matter of comity. (See Biewend v. Biewend, 17 Cal. 2d 108, 113.) California courts have no more jurisdiction to fashion such a decree than did the Utah court. (Miller v. Miller, supra, 52 Cal. App. 2d 443.)
>
> "Judgment in the quiet title action is reversed. To the extent that the decree establishing the Utah divorce decree excludes paragraphs 7 and 8 of the latter, it must be modified. In order to accomplish that result we reverse the exclusion provision of the decree and remand to the trial court for further proceedings consistent with this opinion."

In her petition for rehearing by the District Court of Appeal, and in her petition for hearing by the California Supreme Court, petitioner contended that the judgment of said District Court of Appeal, insofar as it denied recognition and enforcement in California of that portion of the Utah decree providing for vest-

ing of the remainder interest in said real property in the children of the parties upon the younger attaining the age of eighteen years, was in violation of the full faith and credit clause of the Constitution of the United States.

Jurisdiction of this court is invoked under 28 U.S.C. § 1257 (3). The decision of the District Court of Appeal is a "final judgment rendered by the highest court of the state in which a decision could be had" within the rule of *Richfield Oil Corp. v. State Board of Equalization,* 329 U.S. 69, 67 S. Ct. 156, 91 L. ed. 80. (See *Chavez v. Sargent,* 52 Cal. 2d 162, 188, 339 Pac. 2d 801, 817.)

(Remand to the trial court was for the sole purpose of implementing the District Court of Appeal's determination of the legal issue as to the validity of the term of the Utah decree relating to the California land. Under California law, that decision is the "law of the case" and is not subject to further consideration either by the trial court or on appeal from the decree which it will fashion pursuant to the District Court of Appeal's instructions. (*Lial v. Superior Court,* 133 Cal. App. 31, 23 Pac. 2d 795; *Snoffer v. Los Angeles,* 14 Cal. App. 2d 650, 58 Pac. 2d 961; *Lierly v. McEwen,* 208 Cal. 645, 283 Pac. 943; *Carter v. Superior Court,* 96 Cal. App. 2d 388, 215 Pac. 2d 491; *McCulloch v. Superior Court,* 91 Cal. App. 2d 641, 205 Pac. 2d 689; *Phillips v. Patterson,* 34 Cal. App. 2d 481, 93 Pac. 2d 807).)

The judgment of the District Court of Appeal became final for the purpose of commencing the ninety

day period within which this petition must be filed no earlier than June 24, 1964 when the California Supreme Court made its order refusing a hearing. (See *Market Street Railway Co. v. Railroad Commission*, 324 U.S. 548, 65 S. Ct. 770, 89 L. ed. 1171; *American Railway Express Co. v. Levee*, 263 U.S. 19, 44 S. Ct. 11, 68 L. ed. 140; *Chavez v. Sargent, supra*, 52 Cal. 2d 162, 188, 339 Pac. 2d 801, 817.)

QUESTION PRESENTED

May California, consistent with the mandate of the full faith and credit clause, permit collateral attack upon, and refuse to enforce that portion of a Utah decree ordering respondent to divest himself of a portion of his California land, where Utah was the marital domicile, and where respondent husband participated fully in the Utah litigation, acquiesced in the decree entered therein by obtaining modification of the very provision thereof which the California court subsequently refused to enforce, and failed to avail himself of his right to appeal?

STATUTES INVOLVED

U.S. Const., Art. IV, sec. 1:

> "Full Faith and Credit shall be given in each State to the Public Acts, Records and judicial proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

28 U.S.C. Sec. 1738:

* * *

"Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the Court of such State, Territory or Possession from which they are taken."

Utah Code 30-3-5:

"30-3-5. Disposition of Property and Children.

"When a decree of divorce is made the court may make such orders in relation to the children, property and parties, and the maintenance of the parties and children, as may be equitable; provided, that if any of the children have attained the age of ten years and are of sound mind, such children shall have the privilege of selecting the parent to which they will attach themselves. Such subsequent changes or new orders may be made by the court with respect to the disposal of the children or the distribution of the property as shall be reasonable and proper."

STATEMENT

The parties were married at Reno, Nevada, on September 9, 1947. Respondent had been married previously and during that marriage had acquired a 41 acre parcel of real property located near Sacramento, California. Upon termination of the prior marriage, he received said acreage as his separate property. The

property is composed of two adjoining parcels approximately equal in size.

In 1949, following a short residence in Texas where their first child was born, the parties moved to Salt Lake City, Utah where they purchased a home and respondent engaged in business. Their second child was born there in December, 1949. At the time of the divorce hearing in Utah, respondent was the owner and operator of three business entities, all located in Salt Lake City.

Respondent, represented by counsel, appeared in person at the trial in Utah. The Utah court determined that petitioner was entitled to a divorce on the ground of respondent's extreme cruelty and that she should be awarded custody of the children with visitation rights to respondent. With respect to the property and the maintenance of petitioner and the children, the Utah court, finding that respondent's enterprises gave him an earning capacity of $8,550.00 per year, awarded all of the business assets to respondent and ordered him to pay $200 per month child support and $175.00 per month alimony. The proceeds of the sale of the family residence in Salt Lake City were divided equally between the parties; petitioner was awarded what remained of the household furniture; respondent received the family automobile. Savings in the form of insurance on respondent's life were confirmed to respondent "leaving to his discretion the beneficiaries thereof, with the admonition, nevertheless, to keep in mind his said children as said bene-

ficiaries." Finally, the Utah court found it fair and equitable that the land in California be equally divided in kind, one-half to remain the property of respondent and one-half to be conveyed by respondent to petitioner, in trust, for the use and benefit of the children.

The portion of the Utah court's findings of fact and conclusions of law relating to the California land were as follows:

"Findings of Fact

* * *

"10. That defendant owns in his own name real property situate in Sacramento County, State of California, particularly described as follows:

> Lots 1 and 3, Block 16, of Fair Oaks Tract according to the official plat thereof filed in the office of the Recorder of Sacramento County, California, on September 24, 1895, in Book 3 of Maps, Map No. 24.

containing 41.5 acres more or less; that said real property is capable of being equally divided in kind and that it is fair and equitable that the South half of Lots 1 and 3 of the Block and Tract aforesaid, together with the rents, issues and profits therefrom, be transferred, conveyed and set apart to plaintiff in trust for the use and benefit of said children as hereinafter more particularly specified."

* * *

"Conclusions of Law

* * *

"7. That the defendant should be ordered and directed to forthwith execute and deliver all ap-

propriate documents to transfer, convey and set apart to plaintiff as trustee, and plaintiff as such trustee is entitled to a judgment and decree entitling her to receive that certain piece and parcel of real property situate in the County of Sacramento, State of California, particularly described as:

> The South Half of Lots 1 and 3, Block 16, of Fair Oaks Tract according to the official plat thereof filed in the office of the Recorder of Sacramento County, California, on September 24, 1895, in Book 3 of Maps, Map No. 24.

together with the rents, issues and profits therefrom.

"8. That plaintiff shall hold the real property next above described in trust for the education and support of the said minor children of the parties, and shall convey the corpus of the trust estate and all accumulations and additions thereto in equal shares to said minor children, or the survivor of them, when the youngest attains or would have attained the age of eighteen years. Plaintiff shall have the usual and ordinary powers of trustee in the premises, subject to the approval and further directions of the Court, and shall have the right to sell, mortgage, invest the trust estate under such direction and approval."

* * *

The pertinent provisions of the Utah decree are paragraphs 7 and 8 thereof, Appendix A. hereto, *infra*, pp. iv and v.

Following entry of the decree on October 3, 1958, respondent moved the Utah trial court for its order

modifying same and said motion was duly heard on December 12, 1958, with counsel for both parties participating in the argument on the motion. The result was an order under date of December 17, 1958, which modified the decree of October 3, 1958. The motion was heard and the modifying order was made by the same judge who had heard the evidence introduced at the trial of the divorce action and who had signed the findings, conclusions and decree of October 3, 1958. The modifying order amended the above quoted provisions of the findings of fact, conclusions of law, and decree to provide that it was the north half of the property which respondent was to convey to appellant in trust instead of the south half. The modifying order concluded as follows:

> "The findings of fact, conclusions of law and decree duly made and entered herein on the 3rd day of October, 1958, are in all other particulars hereby ratified, approved and confirmed, and defendant's motions, except as expressly granted above, are hereby overruled and denied."

Respondent did not appeal from the decree of the Utah court or the order modifying same, although, under Utah Law, appeal was available. In Utah, the Supreme Court tries such appeals, de novo, on the record of the proceeding in the trial court. (*Martinett v. Martinett*, 8 Utah 2d 202, 331 Pac. 2d 821.)

Following the termination of the divorce proceeding in Utah, both petitioner and respondent moved to California. Petitioner took up residence in Berkeley, California. Respondent took up residence in Sacra-

mento, California. Respondent did not execute the conveyance ordered by the Utah court.

On June 18, 1959 appellant commenced the California litigation by filing a complaint in the Superior Court of the State of California, in and for the County of Sacramento. In her complaint she set forth the Utah decree and order modifying same and alleged respondent's wilful refusal to comply with the provision requiring him to convey to her the north half of the California land as ordered by the Utah court. She prayed that the Utah decree and order modifying same "be entered herein as a foreign judgment with the same force and effect as if said decree and said order modifying decree had been granted by this court"; for a decree quieting her title to the north half of the California land; and for other relief.

On August 11, 1959, respondent filed a complaint in the same court to quiet his title to the north half of said land. The actions initiated by petitioner's complaint and by that of respondent were consolidated for trial.

Following trial, said Superior Court made findings of fact, their pertinent provisions thereof being as follows:

"Findings of Fact

"I

"The District Court of the Third Judicial District in and for Salt Lake County, State of Utah, was, at all times herein mentioned, a court of general jurisdiction duly created and organized

under the laws and constitution of the State of Utah. On October 3, 1958, in Action No. 96932, said court made and entered its decree, findings of fact, and conclusions of law, a true copy of which is attached as Exhibit 'A' to the decree herein. Said Utah decree was modified by order dated December 17, 1958, a true copy of which is attached as Exhibit 'B' to the decree herein. Said Utah decree and order are final. Defendant appeared personally and by counsel in said Utah proceedings and said court had jurisdiction over the person of said defendant. Said Exhibits to said Decree are hereby incorporated herein by reference."

* * *

"III

"Prior to the marriage of plaintiff and defendant, defendant acquired said real property as his sole and separate property. Defendant has never conveyed said real property, nor any part thereof, nor any interest therein to plaintiff or to said children, in trust or otherwise, but has refused and failed to convey any portion of said real property as ordered by said Utah Court."

Simultaneously the court made its conclusions of law as follows:

"Conclusions of Law

"I

"Said decree of the Utah court, as modified, and attached to the decree herein as Exhibits A and B, should in all respects be established as a California decree, excepting only those portions

of the provisions of paragraphs 7 and 8 of said Utah decree, and the order of December 16, 1958, modifying the same, which relate to the California property there described, and excepting the provisions of said order directing that payments of alimony and support be made to the County Clerk of Salt Lake County.

"II

"The said provisions relating to the California property were beyond the jurisdiction of the Utah court, were therefore void, could be collaterally attacked in Utah on that ground, and this court therefore need not give to said provisions the full faith and credit otherwise commanded by the Constitution of the United States.

"III

"Defendant is the owner of said property as his sole and separate property free and clear of said trust provisions and neither plaintiff nor said minor children either as individuals or as trustees or beneficiaries of a trust, have any right, title or interest therein except as follows:

"Plaintiff should have a lien against said property for the accrued and unpaid installments of alimony and child support herein found to be due and the provisions of said decree, herein established as a California decree, for child support accruing in the future should be a lien upon said property."

In the companion case wherein respondent sought to quiet his title to said property, the court made the following pertinent findings of fact:

"Findings of Fact

"I

"It is true that plaintiff above named and defendant Barbara Ann Farley were married on September 9, 1947 and said marriage was duly terminated by Decree of Divorce made on October 3, 1958 by the District Court of the Third Judicial District in and for Salt Lake County, State of Utah.

"II

"It is true that prior to said marriage plaintiff acquired as his sole and separate property the following described real property situate in the County of Sacramento, State of California:

> Lots 1 and 3, Block 16, of Fair Oaks Tract, according to the official plat thereof filed in the Office of the Recorder of Sacramento County, California, on December 24, 1895, in Book 3 of Maps, Map No. 24.

"It is true that at all times during said marriage and at the time of the aforesaid decree of divorce plaintiff continued to and did own said real property as his sole and separate property."

* * *

"VI

"It is true that Ross Edward Farley has never conveyed said real property, nor any part thereof, nor any interest therein to defendants herein or any of them, in trust or otherwise. It is true that Ross Edward Farley has refused and failed to convey any portion of said real property as ordered by said Utah Court.

"VII

"It is true that said Utah Court was without jurisdiction to make the aforesaid order concerning said California real property, and that said order was and is subject to collateral attack in Utah, and need not be enforced by this court, and that defendants have no right, title or interest in or to said separate real property of Ross Edward Farley."

Simultaneously therewith the court made its conclusions of law as follows:

"Conclusions of Law

"From the foregoing facts the Court concludes:

"I

"That the said Utah Court was without jurisdiction to make the aforesaid order concerning said California real property, and that said order was and is subject to collateral attack in Utah, and need not be enforced by this court, and that said order is void and without effect insofar as the same purports to affect the said real property.

"II

"That plaintiff is the owner of said real property as his sole and separate property free and clear of any right, title, interest or claim of defendants, or either of them, above-named, and plaintiff herein is entitled to have his said title quieted as against defendants herein, subject only to the lien imposed on said real property for alimony and child support in Action No. 119222 in this Court entitled Barbara Ann Farley, Plaintiff, vs. Ross E. Farley, et al., Defendants."

Judgments upon said findings were duly entered. The pertinent provisions of the decree in petitioner's enforcement action are paragraphs 1 and 2 thereof, Appendix B, *infra*, p. ix.

The pertinent provisions of the decree in the quiet title action are set forth in Appendix B, *infra*, p. viii.

On appeal to the District Court of Appeal of the State of California, in and for the Third Appellate District, petitioner contended as follows:

> "A. BECAUSE RESPONDENT APPEARED IN THE UTAH PROCEEDING WITH FULL OPPORTUNITY TO LITIGATE ALL ISSUES BEFORE THE UTAH COURT, AND BECAUSE THE QUESTION OF THE POWER OF THE UTAH COURT TO ORDER RESPONDENT TO CONVEY TO APPELLANT, IN TRUST, WAS AN ISSUE NECESSARILY DECIDED BY THE UTAH COURT IN THAT PROCEEDING, RESPONDENT IS PRECLUDED BY THE DOCTRINE OF RES JUDICATA FROM IMPEACHING THE UTAH DECREE ON THE GROUND THAT THE UTAH COURT DID NOT HAVE POWER TO ORDER THE CONVEYANCE IN TRUST, AND, SINCE THE RECORD HEREIN CONTAINS NO EVIDENCE THAT THE UTAH DECREE IS SUBJECT TO COLLATERAL ATTACK IN UTAH FOR ANY DEFECT OTHER THAN THE CLAIMED LACK OF POWER TO ORDER THE CONVEYANCE IN TRUST, THE DECREE MUST BE ENFORCED HEREIN UNDER THE MANDATE OF THE FULL FAITH AND CREDIT CLAUSE."

The decision and judgment of the District Court of Appeal is Appendix C hereto and is self-explanatory. Petitioner sought rehearing by said District Court of Appeal contending that its conclusion that the Utah decree is only partially enforceable violates the mandate of the full faith and credit clause of the Constitution of the United States. Upon denial of said request for rehearing, petitioner sought hearing by the California Supreme Court and in said petition urged:

> "THE DISTRICT COURT OF APPEAL ERRONEOUSLY DETERMINED THAT THE UTAH DECREE WAS SUBJECT TO COLLATERAL ATTACK IN UTAH AND THAT IT WAS RENDERED UNDER CIRCUMSTANCES WHICH DID NOT ACCORD TO RESPONDENT A FULL OPPORTUNITY TO LITIGATE THE ISSUE OF THE UTAH COURT'S POWER TO GRANT THE RELIEF WHICH IT DID. AS A RESULT, ITS DECISION DENIES FULL FAITH AND CREDIT TO THE UTAH DECREE."

Both the order denying rehearing by the District Court of Appeal and that denying a hearing by the California Supreme Court were rendered without opinion.

REASONS FOR GRANTING WRIT

The California court has refused to accord full faith and credit to that portion of a Utah decree

which implements the Utah divorce court's power to provide for the "maintenance of the parties and the children" by requiring respondent to execute a deed which will result in his children acquiring until their majority the use of, and thereafter, the entire ownership of, a parcel of his California land.

It is true, of course, that the full faith and credit clause requires California to accord to the Utah decree only as much recognition as it would receive in Utah. However, the California court's determination that the Utah award "exceeds the jurisdiction of the Utah court to the extent that it decrees transfer of property or money to the children when they reach adulthood" (Appendix C, *infra*, p. xxi), has the effect of placing a limitation upon the full faith and credit clause. The California court has decided a question involving "what is a permissible limitation upon the full faith and credit clause"—a question as to which this court is the "final arbiter." (*Johnson v. Muelberger*, 340 U.S. 581, 584, 95 L. ed. 552, 71 S. Ct. 474.)

It is, and has been, petitioner's contention that the decision of the California court is not in accord with applicable decisions of this court. Utah was the marital domicile. Its decree was entered after a full and fair trial of the issues raised by the pleadings. Respondent appeared and participated in the trial with the assistance of counsel. He acquiesced in the decree by successfully requesting modification of the very portion thereof which, in California, he refused to obey. He did not exercise his right to appeal.

Despite all this, the California court has permitted him to mount a successful collateral attack upon the Utah judgment.

In its opinion, the California court recognizes the rule of jurisdictional finality which this court has stated bars relitigation in the enforcement forum of issues determined in the rendering forum under circumstances permitting full opportunity to litigate. (*Davis v. Davis,* 305 U.S. 32, 83 L. ed. 26, 59 S. Ct. 3; *Stoll v. Gottlieb,* 305 U.S. 165, 83 L. ed. 104, 59 S. Ct. 134; *Treinies v. Sunshine Mining Co.,* 308 U.S. 66, 84 L. ed. 85, 60 S. Ct. 44; *Sherrer v. Sherrer,* 334 U.S. 343, 92 L. ed. 1429, 68 S. Ct. 1087; *Durfee v. Duke,* 375 U.S. 106, 11 L. ed. 2d 186, 84 S. Ct. 242.) The California court even noted that the rule "should apply with even more vigor when the subject of attack is not the original court's lack of fundamental jurisdiction but a grant of relief exceeding its defined judicial power." (Appendix C, *infra,* p. xxii.) But it found in the record "unusual circumstances which prevented an earlier and more appropriate attack" (Appendix C, *infra,* p. xxii.) It determined that this is a case which "presents unusual circumstances which make jurisdictional contest by collateral attack just as appropriate and just as consistent with fair play as direct attack in the original litigation." (Appendix C, *infra,* p. xxiv.)

It therefore held that respondent could attack the validity of the Utah decree in the California enforcement action and, having already determined that the Utah court did not have jurisdiction to require a con-

veyance which would cause the trust res to vest in the children upon their attaining majority, remanded the cause to the trial court with instructions to proceed in conformity with said determination.

This court will note the similarity here to the recent case of *Aldrich v. Aldrich*, ... U.S. ....., 12 L. ed. 2d 1020, ... S. Ct. ..... The California court, finding no Utah law on the subject, resorted to the presumption of parallel doctrines and looked to California law to determine whether the Utah court could decree transfer of the property by respondent to his children. It is petitioner's contention that this was erroneous. The Utah statute clearly confers upon the Utah court the power which it exercised. However, this court may deem inquiry to the Supreme Court of Utah about the extent of the Utah trial court's power pursuant to Utah Code 30-3-5, and about the vulnerability of its decree to collateral attack in Utah to be the appropriate procedure for determining the issue raised by this petition.

The California court does not cite, and petitioner has not found, authority which permits a state to refuse full faith and credit to a sister state judgment, rendered in the exercise of jurisdiction of both the subject matter of the litigation and the persons of the parties thereto, for the reasons advanced by the California court, or, for that matter, reasons of similar substance. To the contrary, applicable decisions of this court would indicate that much more weighty considerations than those mentioned by the California court herein have been deemed by this court to be

insufficient to justify erosion of the principles underlying the full faith and credit clause and, where, as here, the fate of a final judgment of a sister state is involved, those underlying the doctrine of *res judicata*.

The court's attention is directed to *McElreath v. McElreath*, 162 Tex. 190, 345 S.W. 2d 722, a decision of the Supreme Court of Texas which is in substantial conflict with that review of which is herewith sougnt. The Texas trial court and lower appellate court refused, on the authority of *Fall v. Eastin*, 215 U.S. 1, 30 S. Ct. 3, 54 L. ed. 65, to enforce an Oklahoma divorce decree which awarded to wife, as alimony, Texas land which husband inherited from his father and was, thereafter, his separate property. The parties were residents of Oklahoma. Both appeared and participated fully in the Oklahoma proceeding. Texas law, like that of California, did not permit award of husband's separate property to wife.

In reversing, the Supreme Court of Texas held that *Fall v. Eastin* did not control because the Oklahoma decree did not purport to act directly upon the res, the Texas land. Despite the difference between the Oklahoma and Texas law on the subject of the power of the divorce court to award separate property of husband to wife, the court could find no public policy of Texas to which the Oklahoma decree was repugnant and, bottoming its decision on comity, held that Texas should enforce the Oklahoma decree. *McElreath* has been followed by the Court of Appeals of the District of Columbia in *Phelps v. Williams*, 192 A. 2d 807.

The important constitutional issue presented by the facts of this case is evident and needs no elaboration here.

CONCLUSION

For the foregoing reasons petitioner respectfully submits that this petition for writ of certiorari should be granted.

Dated, San Francisco, California,
September 21, 1964.

ELMER P. DELANY,
Attorney for Petitioner.

CHARLES W. DECKER,
Of Counsel.

(Appendices A, B and C Follow)

Appendix A

In the District Court of the Third Judicial District in and for Salt Lake County, State of Utah

Civil No. 96932

Barbara Ann Farley,
Plaintiff,
vs.
Ross E. Farley,
Defendant.

DECREE

This cause having come on regularly for trial on the 24th day of September, 1958, before the Honorable Aldon J. Anderson, one of the Judges of the above entitled Court, sitting without a jury, the parties appearing in person and by their counsel, Harley W. Gustin for the plaintiff and Ernest F. Baldwin, Jr. for the defendant; and witnesses having been duly sworn and examined and documentary evidence having been offered and received and the evidence having been closed, and the cause having been submitted to the Court for its determination and decision; the parties having availed themselves of counseling services and proceedings as required by law, and the Court having inquired into the legal sufficiency of the evidence so adduced and having made and entered herein

its written Findings of Fact and Conclusions of Law, and it appearing therefrom that the plaintiff is entitled to have judgment in accordance therewith, and the Court being fully advised in the premises, and upon motion of plaintiff's counsel,

It Is, Therefore, Ordered, Adjudged and Decreed as follows, to-wit:

1. That the plaintiff, Barbara Ann Farley, be and she hereby is awarded a decree of divorce from the defendant, Ross E. Farley upon the grounds of mental cruelty, and that the marriage between the plaintiff and defendant hereby is dissolved and that the parties are hereby freed and absolutely released from the bonds of matrimony and all of the obligations thereof, Provided, However, that this decree shall not become final and absolute until the expiration of three months from the date of its entry, at which time this decree shall become final without and further or other action of the parties, unless, during said time, proceedings for a review thereof are pending, or the court, before the expiration of said period, for sufficient cause, upon its own motion, or upon the application of any person whether interested or not, otherwise orders.

2. That the defendant be and he hereby is restrained and enjoined from in any manner threatening plaintiff with any force or violence or in any manner whatsoever molesting her at her place of residence or elsewhere.

3. That the plaintiff be and she hereby is awarded the care, custody and control of the minor children of

the parties, namely, Ross Edward Farley, II, born September 12, 1948, and Barbara Suzanne Farley born December 13, 1949, and the defendant be and he hereby is granted the right to see and visit with said children at all reasonable times and under all reasonable circumstances, and until the further order of the Court to take said children during daylight hours as in said findings of fact and conclusions of law provided, and the plaintiff shall be entitled to remove said children from the State of Utah to the State of California or elsewhere, provided, however, that thereupon the defendant, subject to the further order of the Court, shall have the same rights of visitation at the then domicile of the children as set forth in paragraph 4 of the Court's findings of fact.

4. That the defendant, until the further order of the Court, be and he hereby is ordered, directed and required to pay to the plaintiff the sum of $200.00 per month for the care and support of the minor children of the parties ($100.00 for each of said children) and the sum of $175.00 per month as alimony, said payments to commence upon the entry of this decree and to be paid monthly thereafter, provided, however, that the award of alimony shall terminate upon the remarriage of the plaintiff.

5. That the defendant is $300.00 in arrears in alimony and support money as ordered by the previous order of this Court, and the same is ordered to be paid from the sum of $1756.64 now on deposit in this action with the County Clerk of Salt Lake County,

and the balance of said sum shall thereafter be divided between the parties, the same to be disbursed as in the findings of fact and conclusions of law set forth; that to effectuate said disbursement the County Clerk of Salt Lake County be and he is hereby ordered and directed to pay the total amount of said deposit, to-wit: the sum of $1756.64, to Harley W. Gustin and Ernest F. Baldwin, Jr., the attorneys for said parties, who shall in turn divide the same in accordance with the said findings of fact and conclusions of law.

6. That plaintiff have and recover judgment of and from the defendant for the sum of $260.00 for medical and hospital bills and the sum of $350.00 attorney's fees for the use and benefit of her counsel herein, which last named item shall be paid out of defendant's share of the deposit mentioned in the paragraph next above.

7. That the property and holdings mentioned in finding number 9 of the said findings of fact are confirmed unto the respective parties as in said findings specifically set forth; that the defendant is hereby ordered, directed and required to forthwith execute and deliver all appropriate documents to transfer, convey and set apart to plaintiff as trustee, and plaintiff be and she hereby is awarded, as such trustee, that certain piece and parcel of real property situate in the County of Sacramento, State of California, particularly described as:

The South Half of Lots 1 and 3, Block 16, of Fair Oaks Tract according to the official plat

thereof filed in the office of the Recorder of Sacramento County, California.

together with the rents, issues and profits therefrom.

8. That the conditions of the aforesaid trust are and the plaintiff be and she hereby is declared to have received said property for the education and further support of the said minor children of the parties, and she shall convey the corpus of the trust estate and all accumulations and additions thereto in equal shares to said minor children, or to the survivor of them, when the youngest attains or would have attained the age of eighteen years, and plaintiff shall have the usual and ordinary powers of a trustee in the premises, subject to the approval and further direction of this Court, and shall have the right to sell, mortgage, invest and reinvest the trust estate under such direction and approval.

Dated the 3 day of October, 1958.

By The Court:
/s/ Aldon J. Anderson
District Judge

Attest: Alvin Keddington, Clerk
By Roy L. Hardy, Deputy Clerk
(Seal)

Received copy of the foregoing proposed Decree this 3 day of October, 1958, and the same is approved as to form.

Ernest F. Baldwin Jr.
Attorney for Defendant.

Filed Oct 3 1958

In the District Court of the Third Judicial District in and for Salt Lake County, State of Utah

Civil No. 96932

Barbara Ann Farley, Plaintiff,

vs.

Ross E. Farley, Defendant.

ORDER MODIFYING DECREE

Defendant's motions to amend and make additional findings of fact and to amend judgment accordingly having come on regularly to be heard on the 12th day of December, 1958, before the Honorable Aldon J. Anderson, one of the Judges of the above entitled court, Harley W. Gustin appearing for the plaintiff and Ernest F. Baldwin, Jr. appearing for the defendant, and the court having heard the arguments of counsel and being fully advised in the premises,

It Is Ordered:

1. That the real property particularly mentioned and described in paragraph numbered 7 of the decree as being situate in the County of Sacramento, State of California, awarded to the plaintiff as trustee is hereby changed from the South Half to the North Half of said Lots, and the description thereof be and the same is hereby changed to read as follows:

> The North Half of Lots 1 and 3, Block 16, of Fair Oaks Tract according to the official plat thereof filed in the office of the Recorder of Sacramento County, California,

and paragraph numbered 10 of the findings of fact and paragraph numbered 7 of the conclusions of law as the same pertain to said real property be and the same are hereby amended to read as specifically stated above.

2. That all alimony and support money payments to be made pursuant to the decree of divorce herein from and after the date hereof shall be made to the County Clerk of Salt Lake County, State of Utah, for and on behalf of the plaintiff until the court otherwise orders.

3. The findings of fact, conclusions of law and decree duly made and entered herein on the 3rd day of October, 1958, are in all other particulars hereby ratified, approved and confirmed, and defendant's motions, except as expressly granted above, are hereby overruled and denied.

Dated this 17 day of December, 1958.

By The Court:
/s/ Aldon J. Anderson
District Judge

Attest: Alvin Keddington, Clerk
By Roy L. Hardy, Deputy Clerk
(Seal)

Filed Dec 17 1958

Received copy of the foregoing proposed Order and the same is hereby approved this 16 day of December, 1958.

E. F. Baldwin Jr.
Attorney for Defendant

Appendix B

In the Superior Court of the State of California in and for the County of Sacramento

No. 119,222

Barbara Ann Farley,
Plaintiff,
vs.
Ross E. Farley, Joe Friedman, First Doe, Second Doe and Third Doe,
Defendants.

DECREE

The above entitled matter came on regularly for trial on the 28th day of December, 1960, before the Court sitting without a jury. Plaintiff was personally present and represented by her counsel, Elmer P. Delaney, Esq., and defendant was also personally present and was represented by Mr. Darrel Pierce of the firm of Rowland and Paras; the said cause, having been consolidated for trial with action number 120079, evidence both oral and documentary was presented on said 28th day of December, 1960, and further on the 29th day of December 1960 and on the 3rds and 4th days of January, 1961. That on said last-mentioned date this cause and also No. 120079 was ordered to be submitted after counsel had prepared briefs for the information and assistance of the Court. After counsel presented briefs the court requested further authorities from counsel and thereafter the matter was submitted for decision. Wherefore the Court, having made its findings of fact and conclusions of law:

Now, Therefore, It Is Ordered, Adjudged and Decreed As Follows:

1. That the decree dated October 3, 1958, in Civil Action No. 96932 between Barbara Ann Farley, Plaintiff, and Ross E. Farley, Defendant, in the District Court of the Third Judicial District in and for Salt Lake County, State of Utah, and the Order Modifying Decree dated December 17, 1958, in said proceedings, which Decree and Order are attached hereto as Exhibits "A" and "B", and which are hereby incorporated herein by reference, should be and they hereby are established as the Decree and Order of this court in all respects therein provided, except only those provisions of paragraphs 7 and 8 of said decree, and paragraph 1 of said Order, relating to the real property described in paragraph 2 hereof.

2. That defendant, Ross E. Farley, is the owner of the real property, as his sole and separate property, described in this paragraph 2, free and clear of the trust provisions of said Utah Decree and Order; that plaintiff, Barbara Ann Farley, and Ross Edward Farley, II, and Barbara Suzanne Farley, minors, have no right, title or interest therein, either as individuals or as a trustee or as beneficiaries of a trust, except only the lien rights described hereinafter. Said real property is situated in the County of Sacramento, State of California, and is more particularly described as follows:

> "The north half of Lots 1 and 3 Block 16 of Fairoaks Tract according to the official plat thereof filed in the office of the Recorder of Sacramento County, California"

3. That the sum of $3,525.00 due to plaintiff for accrued and unpaid installments of alimony should be and it hereby is declared to be a lien upon the real property described in paragraph 2 hereof; that the sum of $1,800.00 due to plaintiff for accrued and unpaid installments of child support should be and it hereby is declared to be a lien upon said real property; and that said sums are the amounts accrued and unpaid as of February 2, 1961.

4. That installments due to plaintiff under the terms hereof for child support accruing after February 2, 1961 should be and they hereby are declared to be a lien upon said real property.

5. Custody of said minor children is continued in plaintiff with the right reserved to defendant to visit and be visited by said children at all reasonable times and places. This provision and the provisions for payment of alimony and child support are subject to modification upon pending motions or otherwise for periods subsequent to the date of trial but in view of the written stipulation of the parties as to arrearages of alimony and child support as of February 2, 1961, said orders shall not be subject to modification for periods prior to said date.

Dated this 28th day of May, 1962.

Attest:

C. C. LaRue, Clerk

Stanley W. Reeker

Judge of the above entitled Court

In the Superior Court of the State of California
in and for the County of Sacramento

No. 120079

Ross Edward Farley,
Plaintiff,

vs.

Barbara Ann Farley, individually and as Trustee for Ross Edward Farley, II, Barbara Suzanne Farley; Ross Edward Farley, II, a minor, Barbara Suzanne Farley, a minor,
Defendants.

JUDGMENT

The above entitled matter came on regularly for trial on December 28, 1960, plaintiff appearing by his attorneys, Rowland and Paras, and defendants appearing by their attorney, Elmer P. Delany, and a jury trial having been duly waived, the Court having heard the testimony and considered the evidence, and the cause having been submitted for decision, and written findings of fact and conclusions of law having been prepared, presented, signed and filed;

It Is Adjudged that plaintiff is the owner in fee simple as his sole and separate property of all that certain real property situate in the County of Sacra-

mento, State of California, and particularly described as follows:

> Lots 1 and 3, Block 16, of Fair Oaks Tract, according to the official plat thereof filed in the Office of the Recorder of Sacramento County, California, on December 24, 1895, in Book 3 of Maps, Map No. 24.

It Is Further Adjudged that none of the said defendants have any rights, title, estate, lien or interest in or to the said real property, or any part thereof, except as hereinafter specified.

It Is Further Adjudged that that certain decree dated October 3, 1958, and order modifying same dated December 17, 1958 made and entered in the District Court of the Third Judicial District in and for Salt Lake County, State of Utah, in Civil Action No. 96932, entitled Barbara Ann Farley, Plaintiff, vs. Ross E. Farley, Defendant, insofar as the same purports to affect title to the real property described hereinabove, or any portion thereof, is void and without effect.

It Is Further Adjudged that the said title of said plaintiff in and to the real property described hereinabove be, and the same is quieted in the manner above decreed as against any and all claims of each and all of the defendants above-named, save and except as against the lien imposed on said real property for alimony and child support in Action No. 119222 in this Court, entitled Barbara Ann Farley, Plaintiff, vs. Ross E. Farley, et al, Defendants.

It Is Further Ordered that plaintiff have and recover from defendants costs of suit in the amount of $.....

Dated: May 28, 1962.

Attest:
C. C. LaRue, Clerk

Stanley W. Reckers
Judge of the Superior Court

Appendix C

In the District Court of Appeal
State of California
Third Appellate District
[Sacramento]

3 Civil No. 10,599

Barbara Ann Farley,
Plaintiff and Appellant,
vs.
Ross E. Farley, et al.,
Defendants and Respondents.

Ross Edward Farley,
Plaintiff and Respondent,
vs.
Barbara Ann Farley, et al.,
Defendants and Appellants.

OPINION

Plaintiff is the former wife of defendant. She brings this action to establish a Utah divorce decree as a California judgment. The trial court entered a judgment confirming all except paragraphs 7 and 8 of the Utah decree. Plaintiff appeals, contending that the California courts must give full faith and credit to these two particular paragraphs as well as the remainder of the decree.

The facts are not disputed. Plaintiff and defendant were married in Reno, Nevada, in 1947. At the time of marriage the husband owned as his separate property a 41-acre parcel of land located in Sacramento County. After brief sojourns in California and Texas, they became residents of Salt Lake City, Utah, in 1949. There they purchased a home and the husband engaged in business. One child was born in 1948, another in 1949.

In 1958 Mrs. Farley filed a divorce action in the District Court, Salt Lake County, which is a court of general jurisdiction in Utah. Mr. Farley contested her action and the case went to trial, both parties being represented by counsel. During the course of the proceedings Mrs. Farley testified that she intended to move to California with the children after the decree was entered. In October 1958 the Utah court entered findings and a decree awarding Mrs. Farley a divorce, granting her custody and control of the two minor children, and directing the husband to pay $100 per month for the support of each child and $175 per month as alimony. Mr. Farley's business assets were awarded to him. Paragraph 7 of the decree ordered the husband to execute all documents to convey to the wife, as trustee, the south half of the 41-acre tract in Sacramento County. Paragraph 8 of the decree declared: "That the conditions of the aforesaid trust are and the plaintiff be and she hereby is declared to have received said property for the education and further support of the said minor children of the parties, and she shall convey the corpus

of the trust estate and all accumulations and additions thereto in equal shares to said minor children, or to the survivor of them, when the youngest attains or would have attained the age of eighteen years, and plaintiff shall have the usual and ordinary power of a trustee in the premises, subject to the approval and further direction of this Court, and shall have the right to sell, mortgage, invest and reinvest the trust estate under such direction and approval."

The husband did not appeal from the Utah judgment. In December, 1958, at the request of the husband, the court modified the decree by making the trust provisions applicable to the north half of the Sacramento County property instead of the south half. Plaintiff left Utah in December 1958 and returned to California with her children. Mr. Farley refused to execute a conveyance of half the 41-acre tract, as ordered by the Utah decree, and did not account to plaintiff for any income of the property. In 1959 she instituted Utah contempt proceedings because of his failure to convey the Sacramento County real estate. Pending these proceedings, defendant sold his Salt Lake City business and moved to Sacramento County in May, 1959. He failed to make support and alimony payments regularly, and substantial arrearages accumulated. When plaintiff brought the present suit seeking establishment of the Utah decree, defendant filed a separate action to quiet title to the 41-acre tract as his sole property.

The two actions were consolidated for trial. The trial court concluded that the provisions of the Utah

decree awarding California real estate were subject to collateral attack in Utah, hence not enforceable in California. Thus it excluded these provisions from its decree and quieted defendant's title to the north half of the 41-acre tract but imposed a lien upon it as security for the payment of alimony and child support. Plaintiff appeals not only from the decree entered in the trial court, but also from the adverse judgment in the quiet title action.

Plaintiff relies primarily upon Sherrer v. Sherrer, 334 U.S. 343, and Heuer v. Heuer, 33 Cal.2d 268. These cases announce that the full faith and credit clause of the Federal Constitution (art. IV, sec. 1) bars a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister state, where the defendant has participated in the divorce proceedings, has had full opportunity to contest the jurisdictional issues, and where the decree is not vulnerable to collateral attack in the courts of the state which rendered it. (Sherrer v. Sherrer, supra, 334 U.S. at pp. 351-352; Heuer v. Heuer, supra, 33 Cal.2d at p. 271.)

The Sherrer-Heuer rule deals with attacks on "jurisdiction" in the fundamental sense, as an exercise of judicial power over the subject matter of the litigation and the persons of the litigants. It has particular application to interstate recognition of divorce decrees based upon temporary (sometimes simulated) residence or divided domicile. (See Barber v. Barber, 51 Cal.2d 244; Aldabe v. Aldabe, 209 Cal. App.2d 453.) In the present case both husband and

wife were bona fide residents of Utah and both fully participated in the Utah action. Thus the courts of that state had fundamental jurisdiction over the parties' marital status and their persons. (Sherrer v. Sherrer, supra, 334 U.S. at pp. 350-351; Williams v. North Carolina, 325 U.S. 226, 229-230; Crouch v. Crouch, 28 Cal.2d 243, 249-250; Rest., Conflict of Laws, sec. 110; Rest., Judgments, secs. 16, 33.) The husband cannot now question Utah's jurisdiction as a fundamental exercise of judicial power over the subject matter and parties. Rather, he now makes a collateral attack on the Utah court's "jurisdiction" in the limited sense of the term, asserting lack of power to give the particular relief it did. (Abelleira v. District Court, 17 Cal.2d 280, 289-291.) Theoretically at least, the Sherrer-Heuer doctrine is only of oblique interest here.

Full faith and credit demands only that the Utah decree receive as much recognition in California as it would in Utah. (Halvey v. Halvey, 330 U.S. 610, 614-615; Herczog v. Herczog, 186 Cal.App.2d 318, 324; Gilmer v. Spitalny, 84 Cal.App.2d 39, 44-45.) California will give res adjudicata effect to the decree of a court of another state which, with the parties before it, directs a conveyance of California real estate. (Rozan v. Rozan, 49 Cal.2d 322, 330-331; Riggs v. Riggs, 223 A.C.A. 634, 641-642; cf. Worthley v. Worthley, 44 Cal.2d 465, 468.) Thus the portion of the Utah decree covering the Sacramento County property is entitled to full faith and credit in California if it is valid in Utah; if void for lack of

jurisdiction and subject to collateral attack in Utah, it is not binding here. (Barber v. Barber, supra, 51 Cal.2d at p. 247.) Its vulnerability to collateral attack in Utah is controlled by Utah law. (Gagnon Co., Inc. v. Nevada Desert Inn, 45 Cal.2d 448, 453-454.)

Utah is not a community property state. In dividing assets between a divorcing husband and wife, Utah courts may award property acquired before coverture. (Pinion v. Pinion, 92 Utah 255 [67 P.2d 265, 267].) Section 30-3-5, Utah Code Annotated, 1953, empowers a divorce court to "make such orders in relation to the children, property and parties, and the maintenance of the parties and children, as may be equitable." Utah statutes characterize this statute as broad and comprehensive, authorizing such decrees as the circumstances may warrant, including provisions for the support of children during their minority. (Murphy v. Moyle, 17 Utah 113 [53 Pac. 1010, 1012]; see also Callister v. Callister, 1 Utah 2d 34 [261 P.2d 944].) The Murphy decision specifically upholds a decree directing sale of the husband's land and deposit of the proceeds with the court clerk with directions to pay the wife a fixed monthly sum for support of the minor children. In order to insure payment of future alimony (and inferentially to secure support of minor children), a husband may be enjoined from disposing of his property. (Anderson v. Anderson, 54 Utah 309 [181 Pac. 168].)

As we construe paragraph 8 of the Utah decree, it is designed in part to make the Sacramento real estate, its proceeds and its income, available during the

minority of the two Farley children to finance their education, to meet support needs in addition to the monthly payments of $200, and to serve as security for payment of the $200 monthly allowance if defendant fails to pay. The Utah court also seems to have intended that, in the event of a court-permitted sale, use of either corpus or income for these purposes would be permitted, provided that Mrs. Farley, as trustee during the children's minority, secured advance court approval. The cited Utah cases convince us that the decree is valid to the extent that it serves the above purposes during the children's minority. The decree goes farther, however. It effectively divests Mr. Farley of all interest in the land for the purpose of vesting it, or its remaining proceeds, in the children *when they reach adulthood*.[1] The Utah court has attempted an *inter vivos* disposition of the husband's estate for the benefit of his adult children. No Utah case has been brought to our attention which lends direct or inferential support to such a disposition upon divorce; nor, in our view, may the broad language of the Utah statute be stretched to such an extreme.

Absent a Utah statute or decision covering the case, we presume that Utah law is harmonious with that of California, thus looking to our own law for a

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[1]Specifically, the Utah decree directed conveyance of the trust property to the two children when the younger (a daughter) reached the age of 18. The provision was undoubtedly drawn in view of Utah law conferring adult status on females at the age of 18. (Sec. 15-2-1, Utah Code Ann., 1953.)

solution. (Code Civ. Proc., sec. 1963, subds. 16, 17; Gagnon Co., Inc. v. Nevada Desert Inn, supra, 45 Cal.2d at p. 454.) In California such a disposition of the husband's estate exceeds a divorce court's power. (Miller v. Miller, 52 Cal.App.2d 443.) The Utah statute and Utah decisions lend no support to this award; the presumption of parallel doctrines impels its rejection. We conclude that the award exceeds the jurisdiction of the Utah court to the extent that it decrees transfer of property or money to the children when they reach adulthood. The lack of jurisdiction appears on the face of the Utah decree.

Utah law, like that of California, has it that a judgment may be collaterally attacked when it discloses on its face an order in excess of jurisdiction. (Intermill v. Nash, 94 Utah 271 [75 P.2d 157, 162]; Salt Lake City v. Industrial Commission, 82 Utah 179, [22 P.2d 1046, 1048]; see 29 Cal.Jur.2d, Judgments, sec. 185, pp. 141-143.) Defendant's present collateral attack must nevertheless surmount the hurdle created by his participation in the Utah divorce proceedings.

We have discovered no Utah case law specifically dealing with participation in prior litigation as a factor precluding collateral attack on judgments. Under the full faith and credit decisions of the federal Supreme Court, a defendant may not claim lack of fundamental jurisdiction on the part of the foreign court if the jurisdiction issue has been fully and fairly litigated there. (Sherrer v. Sherrer, supra, 334 U.S. 343; Baldwin v. Iowa State Traveling Men's

Assn., 283 U.S. 522, 525-526.) The same rule applies to cases involving real property. (Durfee v. Duke, 375 U.S. 106 [11 L.Ed.2d 186].)

The rule of jurisdictional finality should apply with even more vigor when the subject of attack is not the original court's lack of fundamental jurisdiction but a grant of relief exceeding its defined judicial power. A California general rule now accords res adjudicata effect to a judgment or decree which rests upon fundamental jurisdiction but exceeds statutory limits upon relief, permitting collateral attack only under unusual circumstances which prevented an earlier and more appropriate attack. (Pacific Mut. Life Ins. Co. v. McConnell, 44 Cal.2d 715, 725-727; 1 Witkin, Cal. Procedure, pp. 411-412; ibid., 1963 Supp. pp. 157-158.) The rule is consistent with decisions invoking consent or estoppel as an *ad hominem* barrier to collateral attack on a divorce decree making an award outside the normal sphere of divorce court jurisdiction, where the objecting party himself tendered the issue or consented to its disposition. (Spahn v. Spahn, 70 Cal. App.2d 791, 796; Morrow v. Morrow, 40 Cal.App.2d 474, 485.) It is also consistent with decisions permitting collateral attack where the divorced spouse had no notice or warning that an award in excess of jurisdiction would be sought in the divorce action. (Craft v. Craft, 49 Cal.2d 189, 193; Burtnett v. King, 33 Cal.2d 805, 811; compare, however, Carter v. Carter, 14 Cal.App.2d 845; Vasquez v. Vasquez, 109 Cal. App.2d 280.) We apply these concepts in the absence of contrary Utah decisions.

Thus we arrive at the final question, whether Mr. Farley's participation in the Utah divorce litigation occurred under such circumstances as would preclude collateral attack. He did not voluntarily enter divorce litigation in a state where he had no residence, choosing first to tender a disputed issue to disposition by a foreign court, then seeking collateral attack to evade an adverse decision. (Cf. Sherrer v. Sherrer, supra, 334 U.S. 343; Barber v. Barber, supra, 51 Cal.2d 244; Heuer v. Heuer, supra, 33 Cal.2d 268.) The courts of Utah, as the state of marital domicile, had jurisdiction of the marital status and, after service of process, of defendant's person. His submission to Utah jurisdiction was an imposed condition of resistance, not a matter of free choice. There is no evidence that he voluntarily submitted the 41-acre tract; his premarital property, to the Utah court for any disposition at all, let alone the disposition which actually ensued. (Cf. Spahn v. Spahn, supra, 70 Cal.App.2d 791.) True, he did request the Utah court to substitute the north half of the property for the south half originally awarded. That act does not signify voluntary submission to the property disposition. It signifies only that defendant may have been constrained by necessity to make the best of a bad situation without acceding to the situation itself. At no time did he make any move to comply with the order directing conveyance, and he left Utah pending a contempt proceeding. What evidence we have is consistent with resistance rather than voluntary submission.

The most significant circumstance militating against defendant is his failure to attack the Utah decree directly by appeal. The law of Utah gave him ample opportunity to contest the property award by means of an appeal.[2] While failure to appeal may preclude collateral attack in some circumstances, it is not an automatic bar. (See Craft v. Craft, supra, 49 Cal.2d at p. 192; cf. United States v. Eastport Steamship Co., 255 F.2d 795, 804.) It is but one factor in determining whether the case presents unusual circumstances which make jurisdictional contest by collateral attack just as appropriate and just as consistent with fair play as direct attack in the original litigation. Under the particular facts here defendant's failure to appeal does not bar him. Mrs. Farley suffered no change of position as a result of that failure. Reversal on appeal would not have resulted in a redistribution of assets between husband and wife, because the provision in excess of jurisdiction affected only the husband's relationship with his children and was not for the wife's benefit at all. Mrs. Farley told the Utah court that she intended to move to California following the decree, and she did so. She now litigates in California as she might have in Utah, suffering no disadvantage from defendant's failure to appeal in the original litigation. The arena of judicial contest has simply been moved from Utah to California. In view of her own move to California, attack on the disputed decree

[2]The Utah decree was entered October 3, 1958. Utah law permits filing of notice of appeal within one month after entry of decree. (Rule 73(a), Utah Rules of Civil Procedure, vol. 9, Utah Code Ann. 1953.)

became at least as appropriate in California as by pursuit of an appeal in Utah. Consequently, defendant's failure to exhaust all theoretically available Utah processes, including appeal, does not foreclose collateral attack.

We do not decide whether the award for benefit of the adult children transcended the Utah court's subject matter jurisdiction or merely exceeded its statutory power. (See Aldrich v. Aldrich, 375 U.S. 249 [11 L.Ed.2d 304].) Opportunity for collateral attack is at least as broad in the former case as the latter. (See Pacific Mut. Life Ins. Co. v. McConnell, supra, 44 Cal. 2d at pp. 725-726.) Thus we have assumed that the latter characterization is appropriate for the purpose of this decision.

We conclude that the Utah decree, so far as it directed conveyance of the land, its proceeds or income to defendant's children upon their reaching adulthood, exceeded the jurisdiction of the Utah court, that it is vulnerable to collateral attack in Utah and not entitled to full faith and credit in California. Plaintiff urges, nevertheless, that she is entitled to a similar disposition at the hands of the California courts as a matter of comity. (See Biewend v. Biewend, 17 Cal.2d 108, 113.) California courts have no more jurisdiction to fashion such a decree than did the Utah court. (Miller v. Miller, supra, 52 Cal.App.2d 443.)

Judgment in the quiet title action is reversed. To the extent that the decree establishing the Utah divorce decree excludes paragraphs 7 and 8 of the

latter, it must be modified. In order to accomplish that result we reverse the exclusion provision of the decree and remand to the trial court for further proceedings consistent with this opinion.[3]

Friedman, J.

We concur:
Pierce, P.J
Schottky, J.

Filed, April 29, 1964,
Wilfried J. Kramer, Clerk.